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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 330.

ESSO STANDARD OIL COMPANY, *Appellant*,

v.

JAMES CLARENCE EVANS, Commissioner of Finance and Taxation, etc., *Appellee*.

BRIEF ON BEHALF OF APPELLANT, ESSO STANDARD OIL COMPANY.

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February 18, 1953.

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REFERENCE TO OPINIONS BELOW

The opinions below (R. 6, 24) have not been officially reported.

GROUNDS OF JURISDICTION

The jurisdiction of this Court to review the decision of the Supreme Court of Tennessee is conferred by Title 28, United States Code, secs. 1257(2) and 2101(c). The judgment of the Supreme Court of Tennessee was entered June 7, 1952. (R. 13). Petition to rehear was seasonably filed June 16, 1952 (R. 14), was entertained and was denied

July 11, 1952. (R. 24). Petition for appeal to this Court was presented on August 8, 1952. (R. 2). Probable jurisdiction was noted November 10, 1952. (R. 327).

STATEMENT OF THE CASE

During 1943-1946, Standard Oil Company of Louisiana, now Esso Standard Oil Company, herein for convenience referred to as "Esso," performed contracts with the United States, pursuant to which Esso received into storage tanks in Tennessee, owned or leased by it, aviation gasoline belonging to the United States and subsequently delivered such gasoline to the United States, or common carriers designated by the United States, as from time to time directed by it. The contracts contained provisions requiring the United States to reimburse Esso for local taxes. (Article 18 of Complainant's Exhibit 1, R. 345-349; Stipulation, R. 326). The State of Tennessee, with full knowledge of these contracts and of the course of dealings between Esso and the United States (R. 283-285, 307-309), made no assertion (until 1949) of tax liability against Esso under secs. 1126-1147 of the Code of Tennessee, 1932, found at pages 278-283 of the Official Code, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943, comprising, so far as here pertinent, the gasoline tax laws of said state.

In 1949, a new Commissioner of Finance and Taxation, charged with enforcement of the tax laws, made a retroactive assessment against Esso for the seven cents per gallon tax on all gasoline so handled during the month of January, 1944, and succeeding months throughout World War II, together with interest, penalties, and a 4/10 cent per gallon inspection fee. No assessment was made for 1943 because this year was barred by the statute of limitations. The tax assessed for January, 1944, was $198,837.03 on 2,840,529 gallons. The taxes assessed for the remainder of 1944, 1945 and for the first six months of

1946 aggregated $3,818,212.16, exclusive of interest, penalties and inspection fees (R. 30, 41). Esso paid under protest the tax, interest, penalty and inspection fees for the month of January, 1944, and brought suit to recover in the Chancery Court. (R. 26-38). The court denied recovery for the tax of $198,837.03, but gave judgment in Esso's favor for the interest and penalty, on the ground that it was inequitable for the State to have collected same, and for the inspection fee on the ground that it was illegally assessed against property of the United States. (R. 315-317). Both parties appealed and the Supreme Court of Tennessee affirmed. On the appeal to this Court only the seven cents per gallon tax is involved. A suit by the State against Esso for the period after January, 1944, is pending in the State court and its disposition will depend upon the decision of this case.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the appendix to the brief for the United States in the companion case, *United States of America* v. *James Clarence Evans, Commissioner, etc., et al.*, Docket No. 378. A brief analysis of these statutes will be appropriate as a preliminary to the argument.

1. A gasoline "distributor" as defined in Code sec. 1126, such as Esso in the case at bar, is subject to the seven cents per gallon tax on all gasoline imported by it into the State for sale or storage, subject to a credit under Chapter No. 50, Public Acts of 1943, for gasoline exported by common carrier to points outside the State.

2. Every person other than a distributor who sells, distributes, or uses gasoline in Tennessee, "when such gasoline has not previously been the measure of a privilege tax under this statute," is defined by the same section of the Code to be a "dealer," and all such persons are made liable for the tax on all gasoline stored or used by them

in the State. Since the gasoline here involved was not currently included in the measure of Esso's tax liability as a distributor, the United States came within the definition of "dealer".

In the early days of the Tennessee gasoline tax law, when it was merely a tax on the sale of gasoline, it was discovered that large users might import gasoline in interstate commerce and escape the payment of the tax. This was the reason the law was amended to include "storage" as a taxable incident; and the reason for the broad definition of "dealer". Under the present law, if a consumer imports gasoline into the state in interstate commerce, such consumer or owner becomes liable for the tax by storing it. Thus a contractor which imported gasoline for its own use; a railroad company which imported gasoline for its own use; and an air line which imported gasoline for its own use, have all been held liable for the tax. *Foster & Creighton* v. *Graham*, 154 Tenn. (1 Smith) 412; *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249; *Am. Airways* v. *Wallace*, 57 F. 2d 877.

The so-called inspection fee (Code secs. 6809 et seq.), of 4/10 cent per gallon, was regarded, prior to the decision in the case at bar, as an identical tax with the seven cents per gallon tax, except that so much of said tax as represents the actual cost of inspection was and is regarded as a true inspection fee. In *Texas Company* v. *McCanless*, 177 Tenn. 238, the Tennessee Supreme Court upheld the contention of the distributor that the statute levying the seven cents per gallon tax and the statute levying the 4/10 cent per gallon inspection fee should be considered *in pari materia*, and that a statute amending Code secs. 1126 et seq., so as to give the distributor credit for the tax on gasoline exported to other states, also amended by implication Code secs. 6809 et seq., with the result that the distributor was also entitled to credit for so much of the 4/10 cent per gallon inspection fee on exported gasoline as did not represent the actual cost of inspection.

Both taxes are considered "privilege taxes" under Article II, sec. 28, of the Tennessee Constitution, which authorizes taxes on "privileges" in addition to uniform *ad valorem* taxes on property. The Tennessee Supreme Court has said: "A privilege is whatever the Legislature choose to declare to be a privilege and to tax as such." *Kurth* v. *State*, 86 Tenn. 134. An illustration of a privilege tax is the tax "on automobiles and motorcycles used for pleasure," upheld in *Ogilvie* v. *Hailey*, 121 Tenn. 392, as against the contention that no business or occupation is involved in the use of automobiles and motorcycles for pleasure.

It matters little how we characterize the tax. For the purpose of Article II, sec. 28, of the Tennessee Constitution, the tax is a privilege tax and not a property tax, because property taxes must be assessed according to the value of the property and must be equal and uniform throughout the state. But in determining Federal constitutional questions, the practical operation and effect is to be considered rather than the nomenclature. *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 401; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366.

The differences between this tax and a Tennessee property tax are: (1) the property tax is levied once a year on any particular item of property, while the gasoline tax is levied only once during the life of the gasoline; (2) the property tax is levied against the person who owns the property on a specified assessment date, while the gasoline tax is levied against the first owner of the gasoline in Tennessee (unless the owner is exempt or immune); and (3) the property tax is measured by the value of the property, while the gasoline tax is measured by the number of gallons of gasoline.

In the case at bar the Tennessee Supreme Court said that the tax was "for exercising the privilege of doing

business in Tennessee by storing and distributing gasoline which was the property of the United States." (R. 12). In *Foster and Creighton* v. *Graham, supra*, the Court called it an "excise tax,"—the same characterization applied in the case at bar to the inspection fee. (R. 8). In *Texas Company* v. *McCanless, supra*, at page 243, the Court characterized it as a tax "measured with respect to property" and remarked that, in order to have jurisdiction to tax it, "the property must be located within the jurisdiction of the state." In *Tennessee Oil Company* v. *McCanless*, 178 Tenn. 683, at page 692, the Court referred to the tax as a "tax on the gasoline." In so characterizing the tax the Court was not attempting to justify it against attack on Federal constitutional grounds. In any event the tax is measured by the gallonage, and in the language of this Court in *United States* v. *Allegheny County*, 322 U. S. 174, 185, there is "little theoretical difference, and no practical difference at all" between a tax on the gasoline and a tax measured by the number of gallons of gasoline owned by the United States.

SUMMARY OF ARGUMENT

1. It is the appellant's contention that the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing gasoline for the United States, is invalid under the federal constitution to the extent that it is assessed with respect to gasoline owned by the United States, under the principle of implied constitutional immunity.

2. It is further the contention of appellant that the Tennessee gasoline tax statute, as construed by the State Supreme Court, unconstitutionally discriminates against gasoline distributors who store and handle gasoline for the owner in the manner in which, and for the compensation for which, Esso stored and handled the gasoline here involved for the United States, in favor of distributors who store and handle gasoline for the owner in the manner and

for the compensation outlined in *Tennessee Oil Company* v. *McCanless*, 178 Tenn. 683, thereby violating the equal protection of the laws clause of the Fourteenth Amendment.

The foregoing contentions are made in the assignment of errors. (R. 4-5).

ARGUMENT

Implied Constitutional Immunity

The question of implied constitutional immunity has been argued in the brief of the United States in its appeal, Docket No. 378, and this appellant refers to and adopts said argument on this point.

We beg to emphasize that this is not a tax on the profits or income derived by Esso from the business of storing the gasoline for the United States. As will be seen, Esso's payments from the United States for the month of January, 1944, exclusive of reimbursement for the rental charge on the Lion Oil Refining Company's tanks of $450.00, amounted to $12,359.55. The tax assessed for this same period was $198,837.03. Considering the tax (as did the State Supreme Court) as an occupation tax levied on Esso "for exercising the privilege of storing and distributing gasoline which was the property of the United States" (R. 12), the disparity between Esso's gross income and the tax is sufficient to distinguish every state tax of this character heretofore upheld by this Court as against a contention that the constitutional immunity of the United States was involved. This tax is not on "the contractor's own property, profits or purchases." *United States* v. *Allegheny County*, 322 U. S. 174, 186.

We are not here concerned with the *theory* that "the power to tax involves the power to destroy," referred to by Mr. Justice Frankfurter in his concurring opinion in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 489, as a "seductive *cliché*." We have here *in practice* the imposition of a state tax which, had it been levied at the time,

would obviously have interfered with the operations of the Army Air Force. The gasoline in question was stored in Tennessee by Esso, as bailee of the United States, so as to be available for shipment by tank trucks to Army airfields in the vicinity of the storage point—some in Tennessee and others in adjoining states. The Tennessee Supreme Court said (R. 10-11) that the "record does not show that Esso was prejudiced in any way by a failure to collect the tax." Since the undisputed evidence was that if the tax had been demanded in 1943, the contracts for 1944 and later years would not have been approved on behalf of the United States (R. 189-190) the State Court must have meant (unless it meant that it was the United States rather than Esso which was prejudiced) that the tax could not have been avoided by mere formal changes in the contracts or minor changes in the method of operations, but only by a discontinuance of the operations in Tennessee. Such discontinuance would have crippled the operations of the Army Air Force in the middle of the war.

The Fourteenth Amendment

In presenting this point, the appellant assumes, only for the purposes of argument, the validity of the argument made by the appellee on the constitutional immunity question, viz., that in the absence of express congressional legislation, a state tax is invalid under that principle only where the legal incidence of the tax, as a matter of state law and without reference to its practical operation and effect, is on the United States. The Fourteenth Amendment question does not arise unless the Court either pretermits, or decides adversely to the contention of the appellants, the constitutional immunity question. If, however, the appellee's theories on this question be accepted, we submit that the tax would nevertheless be invalid under the Fourteenth Amendment.

The question of the liability of a bailee arose here only because the tax could not be collected from the owner.

This was attempted in only one prior case. By a long line of Tennessee decisions,[1] a political subdivision of the State of Tennessee is exempt from taxation except where the taxing statute expressly provides otherwise. Such political subdivisions have accordingly been able to import gasoline into the State in interstate commerce and store and use it without paying the tax. However, in *Tennessee Oil Company* v. *McCanless, supra,* a political subdivision—in that case the Obion County Board of Education—made an arrangement with a distributor to store and handle its gasoline in the distributor's tank with the distributor's own personnel, and the Commissioner of Finance and Taxation sought to collect the tax from the distributor as bailee. The State Supreme Court upheld a lower court decision that the distributor was not liable, saying: "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?"

In the case at bar, Esso relied upon the Tennessee Oil Company decision in support of its contention that, as a matter of state law, it was not liable for the tax. The Supreme Court of Tennessee held that Esso was liable as bailee, and in so doing, did not overrule the Tennessee Oil Company case, but reaffirmed and approved the decision and distinguished it on its facts.

We have only the two Tennessee cases involving the liability of a bailee for the gasoline tax; (1) the Tennessee Oil Company case; and (2) the case at bar. In each case the bailee was a "distributor." On the face of it, the two distributors, Tennessee Oil Company and Esso, were members "of the same class"; and if it appears from the decisions in these two cases that Esso has been selected "for discriminatory treatment" and has been denied "the right to equal treatment," the statute as so construed and applied is unconstitutional as denying to Esso the equal protection of the laws guaranteed by the Fourteenth Amendment. *Hillsborough* v. *Cromwell*, 326 U. S. 620, at

[1] Cited in *Tennessee Oil Company* v. *McCanless*, 174 Tenn. 683.

p. 623. This is true whether the law itself makes the discrimination, as in *McFarland* v. *American Sugar Company*, 241 U. S. 79, or whether, as in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the law is such that it can be and is unfairly and unequally administered and applied.

If, however, distributor-bailees be said to have been divided into two classes, one of which is subject to the tax and the other not subject to the tax, the statute is valid if the classification is reasonable, but is invalid if the classification is arbitrary, illusory or invidious. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412. In his dissenting opinion in *Quaker City Cab Co.* v. *Pennsylvania*, *supra*, Mr. Justice Brandeis said (277 U. S. 406):

> ". . . In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible. Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and in flexibility, the State's power to classify for purposes of taxation. Can it be said that the classification here in question is unreasonable?"

In *Royster Guano Co.* v. *Virginia*, *supra*, this Court, speaking through Mr. Justice Pitney, declared invalid a Virginia tax law which taxed the income of Virginia corporations derived both from business done inside the state

and outside the state, while exempting entirely the income derived from outside the state by Virginia corporations which did no local business, saying (253 U. S. 415-416):

> ". . . Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions herein question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; . . . But no ground is suggested, nor can be conceived of, any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State. Corporations of this class derive no more protection from the State of their origin with respect to their outside business, and are no less subject to taxation by the States in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the State of origin. . . . It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

"The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation." *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, at page 570. Where the legislature expressly makes the classification on the face of the statute, but fails to indicate the reason for differentiating in respect to taxation between the two classes, the

Court may hold the statute valid if the Court can conceive of a valid reason for the differentiation. Cf. dissenting opinion in *Royster Guano Co.* v. *Virginia, supra.* Where, however, the classification is read into the statute by the State Court and the reason for the differentiation is given by the State Court, the inquiry is presumably limited in this Court to whether the reason given is a valid one.

In discussing this proposition we shall disregard entirely the status (as to tax exemption or immunity) of the owner of the gasoline involved. If the basis on which the Court reaffirmed and approved the Tennessee Oil Company decision was that the bailee of an exempt governmental unit is not liable, but the bailee of any other owner *is* liable for the tax, it would follow that the *legal incidence* of the tax is on the owner rather than the bailee, and the decision in the case at bar would unquestionably run afoul of the principle of implied constitutional immunity. Furthermore, if the basis of the discrimination against Esso was the ownership of the gasoline by the United States, or the fact that the United States had agreed to reimburse Esso for local taxes, such discrimination would also render the tax unquestionably invalid under that principle, without reference to the Fourteenth Amendment. The State Supreme Court, however, disclaimed any such intention. The opinion states (R. 11):

> "We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of Station action."[1]

The result of the decision in the case at bar is, if we take the above quoted language at face value, that the distributor, Esso, rendered itself liable for the tax because of the activities engaged in by it in the performance of its contracts with the owner of the gasoline, or because of the basis on which its compensation was computed, or because of the amount of such compensation, or a combination of

[1] This was also true in *United States* v. *Allegheny County, supra.*

some of these factors. Conversely, the distributor, Tennessee Oil Company, did not render itself liable for the tax because its activities in the performance of its contract with the owner of the gasoline were *different* from the activities engaged in by Esso in the case at bar, or the basis on which its compensation was computed was *different*, or the amount of such compensation was *different*.

The question thus resolves itself into whether the differences between the two sets of facts were sufficiently substantial to justify a classification for tax purposes, as the appellee insists, or whether they are so illusory, as the appellant insists, as to render the statute, as so construed and applied, unconstitutional as denying to appellant the equal protection of the laws.

What are the differences? On this point our source of information must be the opinion of the State Supreme Court in the Tennessee Oil Company case and its opinion in the case at bar.

The facts in the Tennessee Oil Company case are stated as follows by the Court (178 Tenn. 689-690):

> "Complainant on learning that the Obion County Board of Education was seeking means by which it might purchase tax free gasoline for the use of its school busses and other purposes incident thereto, contacted the Superintendent of Education and an arrangement was made whereby complainant leased to the said Obion County Board of Education a 12,000 gallon storage tank, being one of four located at its bulk plant at Union City, Tennessee, for $1.00 and other considerations. Complainant agreed to procure gasoline for the said Board of Education at cost plus freight, storing same in the leased tank, and to deliver it on the orders of the Superintendent of Education at a charge of two cents per gallon for such delivery. On receipt of an order from said Board of Education complainant would order a car of gasoline from the Shell Petroleum Corporation to be shipped to Obion County Board of Education, and the gasoline would

then be shipped by the Shell Petroleum Corporation from its Wood River Refinery in the State of Illinois, consigned to Obion County Board of Education and invoiced 'sold to' Tennessee Oil Corporation, Dyersburg, Tennessee, and 'shipped to' Obion County Board of Education. Said gasoline when received was stored in the leased tank.

"The complainant insisted on payment for the gasoline so shipped immediately after each car was unloaded and it billed the Obion County Board of Education for the market cost of the gasoline, freight, and delivery charges, and these amounts were paid by the said Board of Education to the complainant. The Shell Petroleum Corporation charged the gasoline to the account of the complainant and complainant paid said corporation as billed.

"It appears that no gasoline was placed in said leased tank except that shipped to the said Board of Education, and that no gasoline was sold therefrom or was delivered therefrom except that delivered as directed by the Superintendent of Education, and duplicate receipts were taken when the gasoline was delivered, one going to the office of the complainant and one to the Superintendent of Education. The proof further shows that none of said gasoline contained in said leased tank was ever inventoried as stock of the complainant company."

The distinguishing facts in the case at bar are stated by the Court as follows (R. 9-10):

"Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn. 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the

status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business and considering the vast amount of gasoline involved, since the contracts show Esso charged from 18/100 of a cent to 6 3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel."

This latter statement of facts may be supplemented from the record in the case at bar which discloses that during the month of January, 1944, 2,840,529 gallons of aviation gasoline were received into storage in the tanks at Memphis (both the tanks owned by Esso and the tanks leased from Lion Oil Refining Company); 743,824 gallons from Esso's tanks were transported to the 70th Sub-Depot at the Memphis Municipal Airport by Esso in its own tank trucks; and 1,754,712 gallons from Esso's Tanks were delivered to common carrier trucks to be transported to various airfields in Tennessee, Arkansas, Mississippi and Alabama. The total service charge billed by Esso to the United States on the gallonage delivered during the month from its own tanks was $10,174.11, being at the rate of $.0066 per gallon for gasoline delivered to the Memphis Municipal Airport in its own trucks and $.0030 per gallon for gasoline delivered to common carrier trucks. (Complainant's Exhibit 36; R. 173-174, 441). These charges were fixed in Exhibit A-1 to the service contract relating to the use of Esso's tanks. (Complainant's Exhibit 1; R. 113, 187, 329). During the same month there were delivered from the tanks leased from Lion Oil Refining Company 238,182 gallons, all to common carrier trucks for transportation to airfields in Arkansas, Mississippi and

Missouri, and the service charge on this gasoline was $.0018 per gallon or $428.73. (Complainant's Exhibit 37; R. 173-174, 442). This was the charge fixed in Exhibit A to the applicable service contract. (Complainant's Exhibit 2; R. 113, 187, 368). There was also a monthly use price of $450.00 for these tanks—the exact amount paid by Esso to Lion Oil Refining Company. (Complainant's Exhibit 2; R. 113, 187, 368; Complainant's Exhibit 34; R. 142, 401). During the same month there were deliveries of 28,334 gallons of gasoline at Knoxville for which a charge of 6.20¢ per gallon was made—this gasoline being delivered into the tanks of the airplanes. (Complainant's Exhibit 3; R. 113, 187, 378; Complainant's Exhibit 38; R. 173-174, 443).

It will be observed that in the Tennessee Oil Company case there was a charge for the use of the tanks of one dollar and a service charge of two cents per gallon. In the case at bar there was a charge for the use of some of the tanks of $450.00 per month and no charge for the use of the other tanks. The service charge was 3/10 of a cent per gallon on most of the gasoline involved, and an average of only a fraction of a cent per gallon on all the gasoline involved. It is submitted that these differences do not justify the classification.

Another difference between the Tennessee Oil Company case and the case at bar, which is suggested by the State Supreme Court, is that in the case at bar "the vast amount of gasoline involved" resulted in a "lucrative return on its tanks" to Esso. We feel that we need not comment on this difference in the two cases except to say that if the appellant is to be charged a tax of seven cents per gallon for obtaining a return on its tanks of a fraction of a cent per gallon for the privilege of storing someone else's gasoline, the business would not be lucrative. The business would be lucrative under these facts only if the tax could be passed on to the owner. The State Supreme Court, however, as heretofore pointed out, disclaimed any intention

to tax appellant *because* the tax was to be passed on. For the purposes of the argument on this point we assume that appellant would have been taxed even if it had no contract for reimbursement.

The remaining difference suggested by the State Supreme Court is that in the Tennessee Oil Company case the contract with the owner stated that the distributor's tank which was to be used for storing the gasoline was being "leased," with the result that the distributor was an "agent" of the owner and not an "independent contractor."

The Court's language in suggesting the above difference is susceptible of two constructions: (1) that Tennessee Oil Company's nonliability was derived from the tax exempt status, under state law, of the Obion County Board of Education, which was the owner of the gasoline; or (2) that irrespective of the tax exempt status of the owner of the gasoline, a bailee is not liable for the tax where the tank is "leased" to the owner of the gasoline, but is liable if the tank is not "leased."

For the purposes of the argument of this point we disregard the first construction of the Court's language, viz., that Tennessee Oil Company was not liable because the owner of the gasoline was tax exempt. We have heretofore pointed out that such construction would mean, as a matter of state law, that the legal incidence of the tax is on the owner of the gasoline; otherwise the bailee could derive no benefit from the tax exempt status of the owner. If the legal incidence of a tax is on the owner, and if the tax is collected from the bailee only for administrative or other practical reasons, it is too clear for argument that the tax cannot be legally collected where the United States is the owner.

The second construction of the Court's language must accordingly be accepted in order to give meaning to the Court's decision, viz., the construction that the tax exempt status of the owner of the gasoline is immaterial, but that

distributor-bailees become liable for the tax when they fail to "lease" their tanks to the owner of the gasoline which they are storing, but are not liable for the tax when they do "lease" their tanks to the owner. It is submitted that this classification is wholly illusory, arbitrary and invidious when applied to the facts here under consideration.

In the Tennessee Oil Company case the tank which was used was one of four located at the distributor's bulk plant so that, as a practical matter, the possession of the tank must have remained as it was; and the clear implication is that the distributor's own personnel handled the receipt and storage of the gasoline and its delivery to the Obion County Board of Education on order of the Board. Similarly, in the case at bar, the tanks remained in the possession of Esso and Esso's own personnel handled the receipt, storage and delivery of the gasoline. If the tank was "leased" in the one case it was "leased" in the other. (Cf. terminology of witnesses, R. 88-93; 105-106; 190). A classification for tax purposes cannot be constitutionally based on the mere use of a word in one contract and its omission in other contracts, where the activities conducted in performance of the contracts are substantially the same.

Nor can the classification be supported on the theory that in the Tennessee Oil Company case the bailee was the "agent" of the owner rather than an "independent contractor." If Tennessee Oil Company was an agent of the Obion County Board of Education, under the facts outlined by the Court, Esso was an agent of the United States. It may be observed that the Court took liberties in using the word "agent" in this connection. No agency in the legal sense was involved in the acts of receiving, storing and delivering the gasoline.

A valid classification for tax purposes must be based upon substance rather than upon words which may have different meanings, such as "lease" and "agent." "The same words may have different meanings in different parts

of the same act. . . ." (*Lamar* v. *U. S.*, 240 U. S. 60, 65). Thomas Hobbes has warned that the wise man has "need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime-twigs; the more he struggles, the more belimed."[1] And, as said by Mr. Justice Holmes, ". . . we must constantly translate our words into the things for which they stand."[2] Where ambiguous words are used in a statute, or read into a statute by the court which construes it, so that a tax administrator or a court may in one case select one meaning and in another case a different meaning, thereby exempting one taxpayer and taxing the other, although the facts are substantially the same, the classification is no less arbitrary, illusory and invidious than if the statute expressly authorized such discrimination.

In the Statement Opposing Jurisdiction it was contended by appellee that the State Court "did not entertain" the Fourteenth Amendment question and "did not decide it." We submit that counsel for appellee were in error in this assertion. The second part of the petition to rehear was confined to the contention that, as construed by the Court, Code Sections 1126 et seq. deny Esso the equal protection of the laws guaranteed by the Fourteenth Amendment and are unconstitutional and void because there is no reasonable basis for the classification made by the Court. In the reply to the petition, appellee insisted (R. 23) that this contention came too late. In denying the second part of the petition to rehear, the Court did not so hold, but said that it was a "re-argument," and that there was "nothing in the re-argument to change our former opinion." (R. 25). This can only mean that the Court had, before rendering the former opinion, considered possible constitutional ob-

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[1] Quoted by Jerome Frank, "A Lawyer Looks at Language," in "Language in Action" by S. I. Hayakawa, New York, Harcourt, Brace and Company, 1939, p. 325.

[2] Ibid., p. 322.

jections to the statute, as construed by the Court, and would not have so construed the statute if such construction, in the opinion of the Court, rendered it unconstitutional.

Moreover, for the reasons pointed out in the Statement as to Jurisdiction, the Fourteenth Amendment question would be properly before this Court even if the Supreme Court of Tennessee had refused to entertain this part of the petition to rehear.

CONCLUSION

In conclusion it is submitted that the judgment of the Supreme Court of Tennessee should be reversed and the case remanded to that Court with directions that judgment be entered in Esso's favor for the tax paid under protest, with interest and costs.

Respectfully submitted,

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